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A LIMITED LIABILITY PARTNERSHIP

April 17, 2003

FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: CS Docket 02-52
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

Submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules is a notice regarding a permitted oral *ex parte* presentation in the above captioned proceeding. On April 16, 2003, Dave Baker of EarthLink, John Butler of Sher & Blackwell, and the undersigned (also with Sher & Blackwell) met with Kyle Dixon, Barbara Esbin, Peter Corea, Mary Beth Murphy, John Norton, Peggy Greene, John Kiefer, Priscilla Lee, and Alison Greenwald, all of the Media Bureau, to discuss EarthLink's continuing concerns in this proceeding.

Mr. Baker explained that EarthLink is the largest independent Internet Service Provider (ISP) in the country, with approximately 4 million dial-up customers and nearly 1 million broadband customers. In response to questions, Mr. Baker explained that EarthLink is presently providing high-speed Internet access service in 41 markets served by cable operators; 39 of those markets are served by Time Warner Cable and the remaining two are now served by Comcast. In both cases, EarthLink was able to obtain service agreements only as a result of merger proceedings involving the cable operators. In the case of the AOL - Time Warner merger, the Federal Trade Commission and the Commission placed conditions on the merger which required Time Warner Cable to allow three unaffiliated ISPs to use the cable network in any market in which AOL was offering or sought to offer cable modem service. The agreement with Comcast arose out of the fact that AT&T Broadband, with which Comcast sought a merger, had committed to both the Commission and the local franchising authorities in Seattle and Boston that they would allow other ISPs on their network. Mr. Baker pointed out that he was not aware of any carriage agreements that have been successfully entered into by ISPs outside of a merger context. Mr. Baker also explained that EarthLink has an agreement with Charter Communications to provide EarthLink's Internet access services to Charter on a wholesale basis.

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Mr. Baker, Mr. Butler, and Mr. Comstock then discussed at some length the points EarthLink has raised in its Comments and Reply Comments in this proceeding. In particular they discussed the benefits that ISPs bring to consumers in terms of price and service competition, and also how multiple ISP access will provide increased opportunities for innovative new services to be developed. There was also a brief discussion of whether or not the Commission could forbear from applying the requirements of Title II of the Act to a facility owner if the FCC's present interpretation regarding the proper classification of cable modem service is overturned by the courts.

Finally, Mr. Baker discussed EarthLink's support for the goals advocated by the Coalition of Broadband Users and Innovators (CBUI); namely that internet users have the right to access any content, use any applications and attach any non-interfering devices. EarthLink pointed out that the goals advocated by CBUI and others (including Amazon.com) can be best achieved in the least regulatory manner through adoption of a basic requirement that facility owners must allow multiple (e.g. 3 or more) independent ISPs on their network. The alternative suggestion, that the Commission should require ISPs on a cable network to certify that they will abide by the CBUI goals, would in fact lead the Commission into regulating the very entities – ISPs—that they have heretofore sought not to regulate.

Please direct any questions to the undersigned.

Cordially,

/s/ Earl W. Comstock

John W. Butler
Earl W. Comstock
Sher & Blackwell LLP
Counsel for EarthLink

cc: Kyle Dixon
Barbara Esbin
Peter Corea
Mary Beth Murphy
John Norton
Peggy Greene
John Kiefer
Priscilla Lee
Alison Greenwald